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No.

IN THE

Supreme Court of the United States

PATTI L. REAMES, PETITIONERS

v.

STATE OF OKLAHOMA, *ex rel.* OKLAHOMA HEALTH CARE AUTHORITY; OKLAHOMA DEPARTMENT of HUMAN SERVICES; MICHAEL FOGARTY; HOWARD HENDRICK,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A person with disabilities under the age of 65 may fund a Trust created under 42 U.S.C. § 1396p(d)(4)(A) (hereinafter "(d)(4)(A) Trust") with her "assets,"and those assets will be exempt for purposes of "eligibility for" and the "amount of" Medicaid benefits she can receive to pay for long term care in a nursing home. 42 U.S.C. § 1396p(d)(1). "Assets" are defined as including all income and resources of the individual. 42 U.S.C. § 1396p(e)(1).

The question presented is whether "income of the individual" which is placed into a (d)(4)(A) Trust is exempt for purposes of determining the "amount of" Medicaid benefits to be received, in other words, exempt from being counted as a co-pay to the nursing home each month. An additional question presented is whether or not the "income of the individual" must be assigned to the (d)(4)(A) Trust in order to be considered exempt from co-pay. If it must be assigned, then is the assignment to the Trust to protect the Social Security Disability benefit in violation of the anti-alienation provision of the Social Security Act, 42 U.S.C. § 407(a)?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Patti Reames respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Tenth Circuit Court of Appeals entered on June 14, 2005, and for which a timely filed petition for rehearing and petition for rehearing en banc was denied on September 26, 2005.

OPINIONS BELOW

The opinion of the United States Tenth Circuit Court of Appeals is reported at 411 F.3d 1164 (10th Cir. 2005), and is reprinted in the appendix hereto p. 1a, *infra*. The order denying the petition for rehearing is reprinted at p. 31a, *infra*. The unreported decision and order of the

United States District Court for the Western District of Oklahoma, entered on December 3, 2003, is reprinted at p.18a, *infra*. The administrative decision of the Director of the Oklahoma Department of Human Services issued on November 19, 2002 is reprinted at p. 25a, *infra*.

JURISDICTION

The United States Tenth Circuit Court of Appeals issued its decision on June 14, 2005. A timely Petition for Rehearing and Rehearing En Banc was denied on September 26, 2005. The jurisdiction of this Court to review the judgment of the United States Tenth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

With regard to the exempt Trust at issue in this case, the Medicaid law at 42 U.S.C. § 1396p states in pertinent part:

> (d) Treatment of trust amounts
> (1) For purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under this subchapter, subject to paragraph (4), the rules specified in paragraph (3) shall apply to a trust established by such individual.
> ....
> (4) This subsection shall not apply to any of the following trusts:
> (A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a

> court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.

Assets for purposes of § 1396p(d)(4)(A) are defined in § 1396p(e)(1):

> (e) Definitions In this section, the following definitions shall apply:
> (1) The term "assets", with respect to an individual, includes all income and resources of the individual.....

The anti-alienation provisions of the Social Security Act, 42 U.S.C. § 407(a), state in pertinent part:

> (a) In general. The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

Because of its length, the relevant provisions of the State Medicaid Manual (SMM) as promulgated by the federal Centers for Medicare and Medicaid Services (CMS) are set forth in the appendix at p. 33a, *infra*.

STATEMENT

Patti Reames is now 53 years old and is physically disabled due to Multiple Sclerosis (MS). Patti Reames is not mentally disabled. For the past approximately 6 years, Patti's MS has forced her to reside in a nursing home.

On February 26, 2002, a Special Needs Trust (SNT), entitled "The Patti Reames Trust," was created for Patti's benefit as authorized by 42 U.S.C. § 1396p(d)(4)(A), hereinafter referred to as "(d)(4)(A) Trust." Patti's Social Security Disability (SSD) payment is direct deposited monthly to the Trust bank account. In 2002, Patti applied for Medicaid to pay for her nursing home care and was approved as of February 27, 2002. However, the notice of approval required Patti to pay almost $800 of her approximately $850 monthly SSD income to the nursing home each month as a co-pay. Patti's SSD income is her only means to obtain physical therapy not covered by Medicaid as well as to afford to escape from the nursing home on occasion for an outing to a restaurant, the mall or cultural events as any other 53 year old person desires to experience.

Patti's SSD payment is directly deposited to the (d)(4)(A) Trust each month and consequently, pursuant to federal law, Patti alleges the SSD payment is part of the (d)(4)(A) Trust assets. 42 U.S.C. §1396p(d)(4)(A) and §1396p(e)(1). Patti alleges that federal law requires that income of an individual deposited into the Trust becomes a Trust "asset", 42 U.S.C. §1396p(e)(1), and that "assets" in the Trust are exempt in determining Patti's eligibility for and amount of Medicaid benefits, 42 U.S.C. §1396p(d)(1). Patti further alleges that OKDHS, contrary

to federal law, is requiring that the SSD payment deposited into the Trust be withdrawn and used as a co-pay to the nursing home thus reducing the 'amount of' Patti's Medicaid benefits. 42 U.S.C. §1396p(d)(1). OKDHS' requirement that Patti withdraw funds from her (d)(4)(A) Trust to pay a nursing home contradicts the terms and purposes of the Trust as a "Special Needs Trust" which by its own terms must not pay for food or shelter for Patti.

Patti filed appropriate administrative appeals with the Oklahoma Department of Human Services (OKDHS) which resulted in a final decision by Defendant Howard Hendrick Director of OKDHS which upheld the co-pay calculation based in part (1) on the non-assignability of the SSD payment to the Trust pursuant to 42 U.S.C. §407(a), or (2) if the deposit was made in the month of receipt then the decision held that the regulations in the SMM had no persuasive effect, and even though the income was deposited to the Trust it still must be paid out as a co-pay to the nursing home. Patti then filed her Complaint in the Federal District Court seeking relief from OKDHS' misinterpretation of federal law.

During oral arguments, again the issue arose of whether or not Patti's SSD payment must be "assigned" or simply deposited within the month of receipt to the (d)(4)(A) Trust. The attorney for OKDHS stated that case did not turn on whether the SSD payment was assigned, or whether Patti received it first and then placed it in the trust, or whether SS places it directly in the trust, but that the SMM only required it to go into the trust in the month of receipt. Therefore, the 407(a) issue was irrelevant. However, despite this concession that the SSD payment did not have to be assigned, the District

Court upheld the Director's decision on the co-pay calculation ruling that the SSD payments placed in the (d)(4)(A) Trust must be subjected to post-eligibility rules for treatment of income resulting in a co-pay to the nursing home. The District Court decision was also based on 407(a)'s anti-alienation clause.

Patti now appeals from the decision of the U.S. Tenth Circuit Court of Appeals which affirmed the co-pay calculation. The Court concluded that income from sources 'other than Social Security' could be protected from co-pay using a (d)(4)(A) Trust. *Reames* at 1171. Thus, the Court discriminates between an employee with a private pension which can be assigned to a (d)(4)(A) Trust and an employee who relies on the public insurance system of Social Security. Additionally, the Court concluded that §407(a) bars Patti from assigning her SSD benefits to the Trust even though she does it voluntarily. Patti asserts that the Trust is the only place in which the SSD benefits will be truly protected for her benefit instead of being taken by the state for a nursing home co-pay, and therefore, she should be permitted to voluntarily assign those benefits to her trust for her benefit, if the Court determines that the federal law requires such assignment. Patti further asserts that the plain language of the federal law exempts the deposit of income and does not require assignment.

The Oklahoma Health Care Authority establishes Oklahoma Medicaid policy and OKDHS determines eligibility for Medicaid under the OHCA's policies. Therefore, OHCA and its director, Michael Fogarty, have also been named as Defendants in these proceedings.